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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF EVANSTON,

Petitioner,

MARY CLARE HENDERSHOT, et al.,

Petitioner-Intervenors

vs.

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIRST DISTRICT

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QUESTIONS PRESENTED FOR REVIEW.

1. Does the denial of a zoning special use for a religious organization deny the free exercise of religion?

2. Is a religious institution entitled to special consideration under a valid zoning ordinance?

PARTIES TO THE PROCEEDING BELOW.

The plaintiffs-appellees in the Illinois Appellate Court First District were the Lubavitch Chabad House of Illinois, Inc., an Illinois general not for profit corporation and La Salle National Bank, as Trustee under Trust Agreement dated November 10, 1977 and known as Trust No. 53425.

The defendant-appellant was the City of Evanston, a Cook County, Illinois, municipal corporation.

The intervenors-appellant were Mary Clare Hendershot, Roger Friskey, Timothy Whitten, Cleo Whitten, James DeBlois, Sarah DeBlois, Marc Siegel, Mary MacKenzie, Margaret Baas, Jeannette Bacey, Elliott Smith, Hazel Smith, Robert S. Atkins and Patricia Atkins.

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vs.

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT FIRST DISTRICT

The City of Evanston, an Illinois corporation, and Mary Clare Hendershot, et al., intervenors, petition for writ of certiorari to review the decision of the Illinois Appellate Court for the First District, rendered December 30, 1982 and the denial of the petition for leave to appeal entered by the Illinois Supreme Court on May 31, 1983.

OPINIONS BELOW.

The order of the Illinois Supreme Court denying petition for leave to appeal entered May 31, 1983 is reprinted in full as Appendix A to this petition.

The opinion of the Illinois Appellate Court at 112 Ill.App.3d 233 filed December 30, 1982, is reprinted in full as Appendix B to this petition.

The final judgment order of the trial court is reprinted in full as Appendix C to this petition.

The opinion of the trial court entered on February 5, 1981 is reprinted in full as Appendix D to this petition.

JURISDICTION.

The opinion of the Appellate Court of Illinois for the First District was filed on December 30, 1982. A petition for rehearing was denied on February 24, 1983. A petition for leave to appeal to the Illinois Supreme Court was denied on May 30, 1983.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254. This petition for writ of certiorari has been filed in accordance with 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the First and Fourteenth Amendments of the Constitution of the United States. The relevant provisions are set forth in Appendix E to this petition.

STATEMENT OF THE CASE.

This is a zoning case in which the respondent, Lubavitch Chabad House of Illinois, a religious organzation, seeks to utilize the subject property for a variety of uses. The property in question is a two-story two-family dwelling located at 2014 Orrington Avenue in the City of Evanston. The building is thirty feet in width and seventy feet in length. Prior to its acquisition by the plaintiff, it was utilized as a legal non-conforming two-family use in the R-1 single-family district. Under the provisions of the Evanston zoning ordinance, a church is a special use in the R-1 district.

The uses sought include rabbinical counseling, religious worship services on the Sabbath and on Jewish high holidays, sleeping facilities for use during the Sabbath period, library, kitchen facilities and an office for the Rabbi, who is the director of the Lubavitch movement in Illinois, together with certain other related facilities. The respondent seeks to utilize the front porch on the second floor as a sanctuary for religious services.

In September of 1977, the respondent entered into a contract to purchase the premises for $149,500 telling the seller the premises would be used for residential purposes. It applied for a variation and special use from the City of Evanston for a church in an R-1 district and a variation from the off-street parking requirements. The City Council of the City of Evanston denied the plaintiffs' application for the special use permit and variation on December 18, 1978.

The subject property is located on the east side of Orrington Avenue in an R-1 single-family zoning district which extends from Foster on the south to Colfax on the north, a distance of approximately six blocks. It has a frontage of forty feet on Orrington and a depth of two-hundred and twenty-one feet with twenty-one hundred square feet of floor area on each floor. Prior to the purchase of the subject property by the respondent, the property had been utilized for a two-family residence and was a legal non-conforming use. The testimony of the real estate experts during the course of the trial indicated that its value at the time of trial for two-family purposes was between $175,000 and $200,000.

The value of single-family homes in the immediate area ranges between $150,000 and $250,000. Immediately north of the subject property is a single-family residence purchased in 1979 for $175,000. Immediately south of the subject property is a small single-family structure known as "Canterbury House". It is owned by the Episcopal Diocese of Chicago. In 1969 the Episcopal Diocese was granted a use variation under which the property can be used only as a counseling facility for the

Episcopal chaplain. Limited occasional counseling takes place in the facility. The variation further required that the property also owned by the Episcopal Diocese and located south of Canterbury House at 709 Foster Street could be used only as a single-family dwelling.

The rest of the west side of Orrington from Foster on the south to Noyes on the north is utilized exclusively for single-family purposes except for the Lutheran Center located approximately two blocks north of the subject property and north of Haven Street as extended. The Center is a lawful non-conforming use established prior to the 1960 zoning ordinance.

The east side of Orrington Avenue is characterized by fine single-family homes. Immediately east of the property fronting on Orrington Avenue an alley separates the rear yards from properties classified for U-2 university purposes. The development within the U-2 district is primarily low-lying converted single-family residences which are now utilized by Northwestern University pursuant to the university district classification.

The respondent in its answer admitted that all religious institutions are subject to the reasonable zoning ordinances of the City of Evanston (C 175) thus apparently eliminating the religious issue. The trial court, however, commented that in its judgment this was strictly a First Amendment freedom of worship case. If that issue wasn't present, then there wasn't much of a case at all in the court's judgment (R 1229). At page 1281, the trial court indicated that his findings were based on the fact that this was a religious use. If not, there would be another finding.

At the time of oral argument after close of proofs, the trial court commented: "It's strictly a First Amendment. Absent that it would be a different case entirely in my judgment" (R 1222). The court further commented at page 1229:

"As I say, Mr. Siegel, in my judgment this is strictly a First Amendment freedom of worship case period. If that issue isn't here, then there isn't much of a case at all in this case in my judgment."

The following colloquy then took place:

"MR. SIEGEL: Your Honor, I agree with you totally when you say that if a First Amendment wasn't present, then there isn't much of a case.

THE COURT: That's correct.

MR. SIEGEL: I would say to your Honor that the First Amendment is not here.

THE COURT: Oh, yes, it is.

MR. SIEGEL: I would suggest to your Honor that the language in the St. James case where the Illinois Supreme Court in exactly the same situation said that freedom of religion was not involved and therefore, a direct appeal would not lie.

THE COURT: Well, in this case in my judgment freedom of religion is involved and a direct appeal will lie in my judgment."

The court went on at page 1232 to say:

"This is more than a land use case. This is a religious question."

During the presentation of the order, the court at page 1291 said:

"Counsel, it's based upon my finding it was a religious use. There's no question, if you had this use being utilized as a hall for Hamburgs and were utilizing it for a similar use, you'd have another finding, obviously, but I had to review this case in the context of a religious use, an old religious use. . ."

The trial court entered judgment in favor of the plaintiffs and against defendant City of Evanston and fourteen neighboring property owners who had intervened. The trial court in its final order held that:

"The City of Evanston, in denying said application for a special use permit for the operation of a church, constitutes an impediment to the practice of orthodox Jewish faith as practiced by members of plaintiff and its followers, in violation of their rights as defined by the First and Fourteenth Amendments to the Constitution of the United States by Article I, Section 3 of the 1970 Constitution of the State of Illinois, and that plaintiff, its members and followers are being restricted from operating a sanctuary for Jewish religious services and rabbical counseling on the subject property, such that plaintiff, its members and followers are being denied the freedom to exercise their religion as guaranteed by the law."

The Appellate Court affirmed the trial court's decision in *Lubavitch Chabad House* v. *City of Evanston,* 112 Ill.App.3d 223. In the course of its opinion, the Appellate Court held that a denial of the special use to a religious organization was an impediment to the free exercise of religion. At page 228, the Court stated:

"As the trial court stated in its memorandum opinion:

'The evidence clearly infers that the defendant City is not concerned with lot lines, requirements, side yard, front yard and rear yard sizes, off street parking, number of occupants and other land use restrictions applicable to real property regardless of ownership. Rather the evidence infers that the real fear of the defendant City and intervenors is that the plaintiff will use its property to permit the plaintiffs to practice their ancient religion in the way they have conducted it for the past centuries, i.e. serving of kosher meals on high holidays to students at Northwestern, leaving those students stay overnight where their religious beliefs demand such and other practices.'

This discredits defendants' statements that the 'City's sole interest (in denying plaintiff's application) was to preserve the integrity of the zoning ordinance' and that '(t)his case is a simple zoning case in which the plaintiff happens to be a religious organization.' Moreover, after seeing and hear-

> ing all the witnesses and the evidence, the trial court specifically found that Evanston's denial of plaintiff's application 'constitutes an impediment to the practice of Orthodox Jewish faith as practiced by members of Plaintiff and its followers***,' in violation of their rights under the first amendment to the Constitution of the United States. For these reasons, we believe that there is no merit to defendants' contention that the denial of a special use permit at this location was not an infringement of plaintiff's right to freedom of religion."

The petitioner's petition for rehearing was denied and the petition for leave to appeal to the Illinois Supreme Court was denied.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The writ should be granted in this case because the decision of the Illinois Appellate Court is clearly in conflict with this Court's implicit holding that a zoning ordinance which prevents the construction of a religious use does not violate the First Amendment. *American Communications Association* v. *Douds,* 339 U.S. 382, 94 L.Ed. 925, 943; *Minney* v. *City of Azusa,* 330 P.2d 255, Appealed Dismissed at 359 U.S. 426, 3 L.Ed.2d 932 for want of a federal question. This court has repeatedly held that a restrictive zoning ordinance otherwise proper does not violate the First Amendment, *Village of Belle Terre* v. *Borras,* 416 U.S. 2, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974); *Young* v. *American Mini Theatres,* 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); *Arlington Heights* v. *Metropolitan Housing Corp.,* 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977), but has never specifically settled the question when applied to a religious use.

The opinion of the Appellate Court, moreover, is contrary to the almost unanimous line of authority in other State Courts of last resort, which hold that religious institutions are subject to

zoning ordinances. *St. James Temple* v. *Board of Appeals,* 100 Ill. App.2d 302, Leave to Appeal denied 40 Ill. 2d 478, cert. den. 395 U.S. 946; *Coston Chapel A.M.E. Church* v. *Chaddick,* 9 Ill.App.3d 321; *Krishna Consciousness, Inc.* v. *City of Evanston,* 53 Ill.App.3d 443; *International Society for Krishna Consciousness, Inc.* v. *City of Evanston,* 89 Ill.App.3d 701; *Corporation of Presiding Bishop* v. *City of Porterville,* 90 Cal.App.2d 656, 203 P.2d 823; *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen,* 330 P.2d 5; *Jernigan* v. *Smith,* 218 Ga. 107, 126 S.E.2d 678; *Archdiocese of Portland* v. *County of Washington,* 458 P.2d 682, 686; *Matthews* v. *Board of Supervisors of County of Stanislaus,* 21 Cal. Rptr. 914.

To the same effect are the decisions in *Allendale Congregation of Jehovah's Witnesses* v. *Grossman,* 30 N.J. 273, 152 A.2d 569, 571; *Smith* v. *United Presbyterian Church,* 331 Mich. 1, 52 N.W.2d 568; *Zion Evangelical Lutheran Church* v. *City of Detroit Lakes,* 21 N.W.2d 203, *Galfas* v. *Ailor,* 57 S.E.2d 834; *Community Synagogue* v. *Bates,* 147 N.Y.S.2d 204; *St. John's Roman Catholic Church* v. *Zoning Board of Appeals,* 121 A.2d 640; *West Hartford Methodist Church* v. *Zoning Board of Appeals,* 121 A.2d 640; *Miami Beach Lutheran Church* v. *City of Miami Beach,* 80 So.2d 880; *City of Chico* v. *First Avenue Baptist Church,* 238 P.2d 587; *Garden Grove Congregation of Jehovah's Witnesses* v. *Garden Grove,* 1 Cal. Rptr. 65; *Pylant* v. *Orange County,* 328 So.2d 199; *Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit,* 130 A.2d 240, 243, Appeal dismissed for want of a substantial federal question, 355 U.S. 40, 79 S.Ct. 120, 2 L.Ed. 2d 71 (1957).

The decision of the Appellate Court in this case, if permitted to stand, apparently would place religious institutions beyond the reach of reasonable zoning ordinances. Such a construction would in effect distort the First Amendment by actually giving a privileged position to religious institutions rather than maintaining the long history of neutrality of the State toward religious uses mandated by this court.

The importance of the case goes well beyond the boundaries of the City of Evanston or even the State of Illinois. It elevates to a position of immunity from the police power any organization which is organized by a religious group or engaged in even peripheral religious activities. We suggest that the long line of decisions of this Court indicates clearly that no specific religious organization nor religious organizations in general are to be given preferential treatment by the State either directly or through its municipalities.

I.

THE DENIAL OF A ZONING SPECIAL USE FOR A RELIGIOUS ORGANIZATION DOES NOT DENY THE FREE EXERCISE OF RELIGION.

This is a zoning case in which the respondent is a religious organization seeking to establish an institutional use in a residentially zoned area. The trial court and the Appellate Court erroneously construed the denial of a special use permit, required under the zoning ordinance, as a denial of First Amendment rights. This court implicitly recognized in the case of *American Communications Association* v. *Douds*, 339 U.S. 382, 94 L.Ed. 925 (1950) that freedom of religion is not involved when a zoning ordinance is applied to prohibit churches in residential areas. At page 397, the court said:

> "We recently dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas. Corporation of Presiding Bishop, C.J.C.L.D.S. v. Porterville, 338 US 805, ante, 487, 70 S Ct 78 (1949)."

This court has also dismissed appeals for want of a federal question, decisions holding that the First Amendment was not violated by the refusal to permit a religious use in residential

areas. *Minney* v. *City of Azusa,* 330 P.2d 255, appeal dismissed at 359 U.S. 436, 3 L.Ed.2d 932, 79 S.Ct. 941 (1959); *St. James Temple* v. *Board of Appeals,* 100 I..App.2d 302, Leave to Appeal denied 40 Ill.2d 478, cert. den. 395 U.S. 946, 23 L.Ed.2d 464, 89 S.Ct. 2019 (1969).

Prior to the decision in this case, the Illinois Appellate Court adhered to the basic principle that the location of churches and other religious uses under the zoning ordinance did not violate religious freedom. In *St. James Temple* v. *Board of Appeals,* 100 Ill.App.2d 302, the Court was concerned with the denial of a special use permit sought by a religious corporation which had occupied and used premises prior to seeking the special use permit required by the Zoning Ordinance of the City of Chicago. The case was initially appealed to the Illinois Supreme Court, which transferred the matter back to the Appellate Court. At page 304, the Court noted the transfer order. It said:

> "The transfer order of the Supreme Court stated in part: 'Although plaintiff claims that there is a question of freedom of religion presented, we find no substantial question of that nature in the record. The case involves only the usual factors present in every zoning case and we have no jurisdiction on direct appeal."

The Illinois Supreme Court denied leave to appeal, 40 Ill.2d 478 and this Court denied certiorari, 395 U.S. 946, 23 L.Ed.2d 464. Also directly in point is the case of *Coston Chapel A.M.E. Church* v. *Chaddick,* 9 Ill.App.3d 321, where the Court reversed a trial court which had granted a special use permit to a church.

The Court in the case of *South Side Move of God Church* v. *Zoning Board of Appeals,* 47 Ill.App.3d 723, again held that a church could be properly excluded from a C2-2 general commercial district. The court found that there had been a total failure to meet the standards required by the ordinance for the

granting of special uses. The *Move of God Church* case made it absolutely clear that, notwithstanding the fact that a religious institution was involved, it was still necessary to show that the standards of the special use ordinance had been met.

In the case of *Krishna Consciousness, Inc.* v. *City of Evanston*, 53 Ill.App.3d 443, the Court had before it a challenge to the denial of a special use for church purposes by the City of Evanston. The court reversed the trial court which had granted a summary judgment in favor of the City. The reversal was based upon the grounds that summary judgment was improper. The court, however, was careful to point out that the basic rules of law holding that religious institutions were subject to zoning ordinances still applied. At page 457, the court said:

> "Our disposition of this case should not be interpreted as a departure from the line of cases holding that religious institutions are subject to reasonable municipal regulation. (See, for example, *South Side Move of God Church* v. *Zoning Board of Appeals* (1st Dist. 1977), 47 Ill.App.3d 723, 365 N.E.2d 118; *Coston Chapel A.M.E. Church* v. *Chaddick* (1st Dist. 1972), 9 Ill.App.3d 321, 292 N.E.2d 215; *St. James Temple* v. *Board of Appeals* (1st Dist. 1968), 100 Ill.App.2d 302, 241 N.E.2d 525.)"

After remand and trial below, the *Krishna* case was then reappealed to the Appellate Court which held that the refusal to grant a special use permit for a church did not constitute a violation of the substantive equal protection rights of the plaintiff. *International Society for Krishna Consciousness Inc.* v. *City of Evanston*, 89 Ill.App.3d 701.

A leading case on the subject is *Corporation of Presiding Bishop* v. *City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823, where the court held that a denial of a permit for the construction of a church was proper. At 203 P.2d 823, 825, the court said:

> "We find no merit in plaintiff's contention that the application of the ordinance to the plaintiff results in an unwarranted restriction of religious worship. The petition-

> er is not a congregation, but holds his property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose."

The case is was appealed to this Court which dismissed the appeal for want of a substantial constitutional question.

The *Porterville* case was followed by the Oregon Supreme Court in *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen*, 330 P.2d 5. The court there affirmed the denial of a writ of mandamus directing the City to issue a permit authorizing the erection of a church in a residential zone. At page 27, the court said:

> "Notwithstanding that the Porterville case treats with an ordinance which excludes churches from single family dwelling zones and with no provision for applications for permission for special use as found in the Milwaukee ordinance, and notwithstanding that appellant, referring to the Porterville case, concedes 'that where the legislature has excluded all but private residences and no churches have been permitted in the area, then such a law may be said to be constitutional, depending on the circumstances of the particular case as to whether the zone includes most of the city,' it still has a most important interest and significant application here. By giving judicial approval to the absolute exclusion of churches from zones reserved for single family dwellings, it is authority for the proposition that such a restriction can be a reasonable application of the police power, and, as was later demonstrated by ***American Communications Assn.*** v. ***Douds***, supra, 339 U.S. at page 397, 70 S.Ct. at page 683, 94 L.Ed. 925, the Porterville exclusion is not an infringement upon the liberties guaranteed by the First Amendment."

The court concluded at page 28:

> "The denial of a building permit to appellant did not prohibit any one of its members from religious worship. Moreover, there is nothing in the record before us to indicate that alternative opportunities to locate do not exist. We do know that a church building could be erected without permit in one of the other zone areas; indeed, it is possible a permit might be issued on proper application as to another site in the same residential zone where traffic congestion would be less likely, or in an unzoned area of Milwaukee, if such exists.
>
> We are not persuaded by appellant's argument that the denial of its application to erect a church in the zone reserved for single dwelling residences works a trespass upon its religious liberties as protected by the Federal or Oregon Constitutions."

In *Minney* v. *City of Azusa*, 330 P.2d 255 the court again followed the *Porterville* decision. At page 259, the court said:

> "The Porterville case is but a recognition and application of the concept that there can be no absolutes even in the field of personal freedoms, and this is and must be a nation of ordered liberties if the fundamental guarantees of the First and Fourteenth Amendments are to survive."

In the case of *Matthews* v. *Board of Supervisors of County of Stanislaus*, 21 Cal.Rptr. 914, the California Court of Appeals specifically held that provisions of the county zoning ordinance, regulating church construction in a residential district and permitting churches therein only if a variance or use permit was first obtained, did not abridge the constitutional right of religious worship. At page 916 the court said:

> "Appellants question the constitutionality of the regulation of church construction in a residential area, upon the ground the Zoning Ordinance restricts freedom of religious worship. The constitutionality of this kind of zoning ordinance is so well settled that we need only cite cases deciding the issue in California. The decisions in Corporation of Presiding Bishop, etc. v. City of Porterville, 90

Cal.App.2d 656, 660, 203 P.2d 823; Minney v. City of Azusa, 164 Cal.App.2d 12, 8, 330 P.2d 255; and Tustin Heights Ass'n v. Board of Supervisors, 170 Cal.App.2d 619, 630, 339 P.2d 914, have settled beyond cavil that zoning laws as such do not abridge the constitutional rights to freedom of religious worship."

"The Supreme Court of New Jersey in the case of *Allendale Congr. of Jehovah's Witnesses* v. *Grosman*, 30 N.J. 273, 152 A.2d 569, held that property used for church purposes may be lawfully subject to zoning restrictions. The court held that such ordinances did not abridge freedom of assembly and worship contrary to the State and Federal Constitutions. At page 571, the court discussed the requirements of the ordinance and commented:

"... they appear to come well within the principles expressed in cases which have heretofore held that property used for church purposes, along with property used for other purposes, may be lawfully subjected to reasonable zoning restrictions. See *Kurman* v. *Zoning Board of Adjustment, etc.*, 351 Pa. 247 40 A.2d 381 (Sup. Ct. 1945); *Galfas* v. *Ailor*, 81 Ga.App. 13, 57 S.E.2d 834 (App.Ct. 1950); cf. *Congregation Temple Israel* v. *City of Creve Coeur*, 320 S.W.2d 451, 456 (Mo.Sup.Ct. 1959); *Milwaukee Co. of Jehovah's Witnesses* v. *Mullen*, 330 P.2d 5 (Or.Sup.Ct. 1958), appeal dismissed 359 U.S. 436, 79 S.Ct. 940, 3 L.Ed.2d 932 (1959); *Minney* v. *City of Azusa*, 330 P.2d 255 (Cal.D.Ct.App. 1958), appeal dismissed 359 U.S. 436, 79 S.Ct. 941, 3 L.Ed.2d 932 (1959); *O'Brien* v. *City of Chicago*, 347 Ill.App. 45, 105 N.E.2d 917, 920 (App.Ct. 1952); *Corporation of Presiding Bishop, etc.* v. *City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823 (App.Ct. 1949); appeal dismissed for want of a substantial federal question 338 U.S. 805, 70 S.Ct. 78, 94 L.Ed. 487 (1949); Crolly, 'Regulation of the Location of Churches by Municipal Zoning Ordinances,' 23 Brooklyn L.Rev. 185, 199 (1957); Note, 'Exclusion of Churches from Residential Areas,' 55 Mich.L.Rev. 601 (1957); Note, 'Churches and Zoning,' 70 Harv.L.Rev. 1428 (1957).

In Appeal of Trustees of Congregation of Jehovah's Witnesses, Bethel Unit, 183 Pa.Super. 219, 130 A.2d 240, 243 (Super.Ct. 1957), appeal dismissed for want of a substantial federal question 355 U.S. 40, 79 S. Ct. 120, 2 L.Ed.2d 71 (1957), the Borough of Bethel had adopted an ordinance which contained an off-street parking requirement applicable to churches, schools, auditoriums, stadiums and similar places of assembly; it also provided that no such places shall be permitted within ¼ mile of each other. In a decision adverse to the appellant Jehovah's Witnesses, the board of adjustment found that its proposed church premises violated the off-street parking requirement and the ¼ mile requirement. The Pennsylvania court, in sustaining the board's decision, first noted that each of the requirements bore a reasonable relation to the safety of the public and then made these comments which are fully applicable here:

'Certainly freedom of worship does not mean that churches are exempt from reasonable police power regulations. Our Supreme Court in *Kurman* v. *Zoning Board of Adjustment of City of Philadelphia*, 351 Pa. 247, 40 A.2d 381, determined that setback requirements are applicable to properties used for church purposes. The concepts of religious freedom, freedom of speech and the press which are embodied in the First Amendment have never been construed as absolute rights and beyond the power of reasonable regulation under the police power. *Board of Zoning Appeals of Decatur* v. *Decatur, Ind. Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115, 123 . . .' "

See also *Smith* v. *United Presbyterian Church*, 331 Mich. 1, 52 N.W.2d 568 (1952); *Zion Evangelical Lutheran Church* v. *City of Detroit Lakes*, 21 N.W.2d 203 (1945); *Galfas* v. *Ailor*, 81 Ga.App. 13, 57 S.E.2d 834 (1950); *Community Synagogue* v. *Bates*, 147 N.Y.S.2d 204 (1955); *St. John's Roman Catholic Church* v. *Town of Darien*, 184 A.2d 42, and *West Hartford Methodist Church* v. *Zoning Board of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956);

Miami Beach United Luth. Ch. v. *City of Miami Beach*, 82 So.2d 880.

City of Chico v. *First Ave. Baptist Church*, 238 P.2d 587; *Garden Grove Cong. of Jehovah's Wit.* v. *Garden Grove*, 1 Cal.Rptr. 65; *Pylant* v. *Orange County*, 328 So.2d 199 (1976), and *West Hartford Methodist Church* v. *Zoning Board of Appeals*, 143 Conn. 263, 121 Atl.2d 640 (1956).

When this Court has dealt with challenges to zoning ordinances based on First Amendment claims, it has rejected the concept that restrictive zoning ordinances violate the First Amendment. In the case of *Young* v. *American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), the court was faced with a challenge to a Detroit zoning ordinance which regulated the location of "adult theatres". The court held that notwithstanding the fact that protected speech was involved, such a zoning restriction was lawful. The court there fell back on its time-honored recognition that First Amendment rights could be restricted under the time, place and manner test and that such rights were not beyond municipal regulation. At page 63, the court said:

> "The city's general zoning laws require all motion picture theatres to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theatres as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

In the case of *Village of Belle Terre* v. *Boras*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974), the Court was considering the constitutionality of a zoning ordinance restricting land use to one-family dwellings and prohibiting occupancy by more than two unrelated persons as a family. The thrust of the

argument was that the ordinance unnecessarily burdened the appellee's First Amendment freedom of association and the constitutionally guaranteed right to privacy. This Court rejected the argument holding there was no violation of the First or Fourteenth Amendment. At page 9, the Court said:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman* v. *Parker*, Supra. The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

In the case of *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977), the Court was faced with a challenge to an Arlington Heights single-family zoning classification on the grounds of a violation of the First and Fourteenth Amendments. It was contended that the zoning ordinance, which had a disproportionate impact on blacks, violated the Constitution. This court held that there was no constitutional violation absent showing an intent to discriminate. The record here, as emphasized by the trial court, is totally devoid of any intent to discriminate against these plaintiffs because of their particular religious practice.

Thus the prohibition against churches and religious uses in a single-family district does not constitute an infringement of religious freedom under the First Amendment. The assumption of the trial court and the Appellate Court that this case involved religious freedom and was not merely a land use case simply was erroneous.

The law is, of course, well established that the Fourteenth Amendment makes the First Amendment applicable to the states and their instrumentalities with respect to matters involving freedom of religion. *Engel* v. *Vitale*, 370 U.S. 421, 8

L.Ed.2d 601, 82 S.Ct. 1236 (1962); *Abington School District* v. *Schempp*, 374 U.S. 210, 10 L.Ed.2d 844, 83 S.Ct. 1560 (1963). Attacks on local zoning ordinances as a deprivation of First Amendment rights thus involve Fourteenth Amendment protections. In the case of *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981), the Court recognized that a state under the First and Fourteenth Amendment had the right to restrict the location of religious activities. At page 647, the court said:

> "It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. Adderley v Florida, 385 US 39, 47-48, 17 L Ed 2d 149, 87 S Ct 242 (1966); Poulos v New Hampshire, 345 US 395, 405, 97 L Ed 1105, 73 S Ct 760, 30 ALR2d 987 (1953); see Cox v Louisiana, 379 US 536, 554, 13 L Ed 2d 471, 85 S Ct 453 (1965). As the Minnesota Supreme Court recognized, the activities of ISKCON, like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. Grayned v City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S CT 2294 (1972); Adderley v Florida, supra; Kovacs v Cooper, 336 US 77, 93 L Ed 513, 69 S Ct 448, 10 ALR2d 608 (1949); Cox v New Hampshire, 312 US 569, 85 L Ed 1049, 61 S Ct 762, 133 ALR 1396 (1941). 'We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.' Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 US 748, 771, 48 L Ed 2d 346, 96 S Ct 1817 (1976); see also Consolidated Edison Co. v Public Service Comm'n, 447 US 530, 535, 65 L Ed 2d 319, 100 S Ct 2326 (1980)."

The Court in *Heffron* concluded at page 654:

> "Given these considerations, we hold that the State's interest in confining distribution, selling, and fund solic-

> itation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest."

Zoning ordinances are adopted under the police power of the state. This Court has long recognized that the application of the police power to First Amendment rights does not violate the constitution. *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158, 88 L.Ed. 652 (1943); *Davis* v. *Beason*, 133 U.S. 333, 33 L.Ed. 637 (1889). In the case of *Poulos* v. *New Hampshire*, 345 U.S. 395, 97 L.Ed. 1105, 73 S.Ct. 760 (1952), this Court, in dealing with a refusal to grant a license for a religious service in a public park, at page 405 specifically held:

> "It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."

In the instant case, a religious group has chosen to invade a single-family neighborhood to establish a multi-use institutional building in a nonconforming two-family residence structure. The uses include counseling, sleeping facilities, office facilities, a library and incidental use of a portion of the second floor as a sanctuary for occasional religious services. The record is clear that absent the religious nature of the respondent, there would be no justification for such an institutional use in a prime residential neighborhood. The decision of the City Council of the City of Evanston in refusing to permit this incursion simply because the respondent is a religious organization was clearly not a violation of the First or Fourteenth Amendments. The erroneous decision of the Appellate Court was contrary to law

and disturbs the whole concept of religious freedom by elevating religious uses to a preferential state never intended by the framers of the Constitution or by this Court.

II.

A RELIGIOUS INSTITUTION IS NOT ENTITLED TO SPECIAL CONSIDERATION UNDER A ZONING ORDINANCE.

In the seminal case of *Everson* v. *Board of Education*, 330 U.S. 1, 91 L.Ed 711 (1946), this Court laid down a fundamental principle at page 15. It said:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

In *Illinois* v. *Board of Education*, 333 U.S. 203, 92 L.Ed. (1947), the Court again emphasized at page 211:

> "In the words of Jefferson, the clause against the establishment of religion was intended to erect a wall of separation between church and state."

The Court has made a distinction between the establishment clause and the free exercise clause of the First Amendment. It has insisted in both instances, however, on a neutral stance. In other words, unlike the Appellate Court in this case, this Court has insisted that there be strict neutrality with regard to religious practices. In *Abington School District* v. *Schempp*, 374 U.S. 201, 10 L.Ed.2d 844, 83 S.Ct. 150, the Court cited *Everson* at page 216 for the proposition:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

The Court went on to recognize a complete separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In addition to the *McCollum* case, the Court cited *McGowan* v. *Maryland*, 366 U.S. at 442, 443 and *Torcaso* v. *Watkins*, 367 U.S. at 492, 493, 495.

The concept that a State and its instrumentalities must remain neutral in matters of religion has continued to find total support in this Court's opinions. Thus in *Gillette* v. *United States*, 401 U.S. 437, 28 L.Ed.2d 168, 91 S.Ct. 828 (1971), this Court at page 449 said:

> "An attack founded on disparate treatment of 'religious' claims invokes what is perhaps the central purpose of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion."

To the same effect was this Court's subsequent decision in *Committee For Public Education* v. *Nyquist*, 413 U.S. 756, 37 L.Ed. 2d 948, 93 S.Ct. 2955. At page 788, the Court said:

> "But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, e.g., Everson v Board of Education, supra; Walz v Tax Comm'n, supra, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."

Thus, it is clear that the First Amendment, and the Fourteenth Amendments prohibit any State or its instrumentality from advancing the cause of religion. The benevolent neutrality which this Court has insisted upon is the best guarantee of continued religious freedom to all parties. Yet the construction of the zoning power, an integral element of the police power, by the Illinois Appellate Court here denies this "neutrality" and places religious institutions beyond the

reach of regulations applicable to other parties similarly situated. The decision of the Appellate Court in effect provides special preference to religious institutions and special immunity from the reach of the police power.

The trial court in this case went out of its way to indicate that he found no religious prejudice or bias on the part of the community or counsel (R 1214). Somewhat inconsistently, he then indicated that the application of the zoning ordinance to a religious institution, as opposed to a similar use by a nonreligious institution, constituted a violation of the First Amendment.

We recognize that a mere error in the court below is insufficient to invoke this Court's jurisdiction by Writ of Certiorari. We suggest, however, that the position taken in the erroneous opinion below does irreparable harm to the basic principle of neutrality in religious matters that this Court has recognized in the First Amendment. The mischief of elevating religious institutions to a preferred position thereby mitigating against the reasonable operation of the police power can be measured not only in discrimination against other uses, but by suggesting that the power of the State could then be utilized not only to advance but also to inhibit the free exercise of this basic constitutional right.

CONCLUSION

This Court should grant the Writ of Certiorari because the opinion of the Illinois Appellate Court is clearly contrary to this Court's opinions in *American Communications Association* v. *Douds*, 339 U.S. 382, 94 L.Ed. 943; *Young* v. *American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976); and *Village of Belle Terre* v. *Boras*, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974) as well as the repeated decisions of State courts throughout the country.

The opinion of the Appellate Court flies squarely in the face of the basic principle of First Amendment law that requires total neutrality on the part of the State in matters of religion. It destroys the concept that the State can neither aid nor inhibit a specific religious group or religious groups in general. It grants immunity from police power regulations simply on the basis of religious identity.

The Appellate Court of Illinois has rendered a decision on an extremely important and far reaching question which we suggest is clearly in conflict with the decisions of this Court and State courts throughout the nation. The question of the relationship of religious institutions to zoning in the light of the First and Fourteenth Amendment is a vitally important question which should be authoritively settled by this Court and the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A—ILLINOIS SUPREME COURT ORDER

58149

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 63708
(217) 783-3876

May 31, 1983

Mr. Jack M. Siegel
Attorney at Law
39 S. LaSalle St., S#919
Chicago, IL 60603

No. 58149 — Lubavitch Chabad House of Illinois, Inc., etc., et al., etc., respondents, vs. The City of Evanston, et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause. This will further serve as notice that the mandate of this Court will issue to the Clerk of the Appellate Court on June 21, 1983.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

APPENDIX B—ILLINOIS APPELLATE COURT OPINION

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC. *et al.*, Plaintiffs-Appellees, v. THE CITY OF EVANSTON, Defendant-Appellant.—(Mary Clare Hendershot *et al.*, Intervening Defendants-Appellants.)

First District (3rd Division) No. 81—633

Judgment affirmed.

Opinion filed December 30, 1982.—Rehearing denied February 24, 1983.

1. ZONING (§216)—*findings that religious organization met zoning ordinance requirements for special use permit were not against manifest weight of evidence.* Trial court's findings that plaintiff religious organization met zoning ordinance requirements for issuance of special use permit to conduct strict orthodox rites on its residential premises could not be disturbed, where such findings were not against manifest weight of conflicting evidence on issue.

2. ZONING (§219)—*denial of special use permit to religious organization could properly be considered as impediment to free exercise of religion.* In light of standard of judicial review as determined by nature of right allegedly threatened or violated rather than power being exercised or specific limitation being imposed, trial court could properly consider city's denial of special use permit as impediment to free exercise of religion by plaintiff religious organization which sought permit for practice of strict orthodox rites on its residential property.

3. ZONING (§125)—*right of freedom of religion rises above other property rights.* Although location of churches and other religious sanctuaries may be regulated by ordinance under proper circumstances, right of freedom of religion rises above other property rights and outweighs considerations of public inconvenience, annoyance, or unrest in determining property of zoning restrictions upon such organizations.

4. ZONING (§222)—*denial of special use permit to religious organization reversed as denial was impediment to free exercise of religion.* City's denial of special use permit was properly reversed on judicial review upon finding that denial was impediment to free exercise of religion by religious organization which otherwise complied with special use requirements for conducting strict orthodox rites on its residential property.

Appeal from the Circuit Court of Cook County; the Hon. James C. Murray, Judge, presiding.

Jack M. Siegel, of Chicago, for appellant City of Evanston.

Robert S. Atkins, of Chicago, for appellant Mary Clare Hendershot.

Ash, Anos, Freedman & Logan, of Chicago (Joseph Ash, George J. Anos, and Lawrence M. Freedman, of counsel), for appellees.

JUSTICE RIZZI delivered the opinion of the court:

This is a declaratory judgment action brought by plaintiff, Lubavitch Chabad House of Illinois, Inc., an Illinois general not-for-profit corporation, against defendant, city of Evanston. Plaintiff sought a judgment declaring that Evanston should have allowed its application for a special use permit relating to certain property located in Evanston. Fourteen neighborhood property owners were permitted to intervene as defendants. The trial court found that plaintiff met all of the requirements for the issuance of a special use permit as set forth in Evanston's zoning ordinance, and that the denial of plaintiff's application for a special use permit constituted an impediment to the free exercise of religion as guaranteed by the first amendment to the United States Constitution. The trial court entered judgment in favor of plaintiff based upon its findings. We affirm.

Plaintiff is a religious body which observes, teaches and practices strict orthodox Judaism, including the observance of the rites and traditions of kashrut and the Sabbath as formu-

lated in the Torah and Talmud. It owns a two-story building on property with a frontage of 40 feet and a depth of 220 feet at 2014 Orrington Avenue, in Evanston, Illinois. Plaintiff proposes to use the premises as a religious sanctuary. Primarily, plaintiff intends to serve Jewish students at Northwestern University, which is in close proximity and has, according to plaintiff's witnesses, about 2,000 Jewish students.

Plaintiff's services would include rabbinical counseling, group discussions and worship services on the Sabbath and Jewish holidays. Also, plaintiff would provide a limited number of sleep-in accommodations for Northwestern University students who do not reside within walking distance of the property. These sleep-in accommodations would be provided only on the Sabbath and Jewish holidays when all travel other than pedestrian travel is prohibited for strict orthodox Jews. There would not be a daily kitchen in operation on the premises, but kosher meals would be served to students participating in services on the Sabbath. Plaintiff would preclude more than 30 persons from taking part in worship services on the premises, which would be in accordance with an applicable provision of Evanston's zoning ordinance.

Plaintiff was informed by Evanston's Department of Inspections and Permits that its intended use of the property constituted a church as defined by the applicable zoning ordinance and, as such, it required a special use permit. A special use permit application was filed, and a full factual hearing was conducted by the zoning board of appeals. The zoning board of appeals found that plaintiff's proposed use met the requirements of Evanston's zoning ordinance, and it voted 4 to 1 in favor of granting plaintiff's application for a special use permit. The zoning board of appeals' recommendation was forwarded to the city council. The city council did not conduct a factual hearing, but it voted to overrule the recommendation of the zoning board of appeals by a vote of 12 to 6, and it denied plaintiff's application for a special use permit. A motion

to reconsider the denial was defeated by a vote of 10 to 9, with the vote of the mayor being used to break the tie vote of the aldermen.

A trial was had in the circuit court at which both sides introduced extensive testimony and exhibits. The evidence establishes that to the west of the subject property is a multifamily condominium building with 40 apartment units. On the adjacent south side of the property is Canterbury House, an Episcopalian facility. Approximately a block and a half north of the property is Lutheran House, a Lutheran facility. At 1935 Shermer Avenue, which is one block west and approximately one block south of the property, in Hillel House, a Jewish facility.

Canterbury House has year-round boarders. There was testimony that worship services are held and brunches are available for students of the Episcopalian faith. On occasion, large gatherings are held on the lawn. Lutheran House has weekly Sunday worship services, which are followed by a coffee hour and brunch. Other activities include Tuesday night study sessions, Wednesday night seminars and Sunday night dinners. Lutheran House is open from 9 a.m. to midnight. Hillel House, which operates under the auspices of the Hillel Foundation, conducts various social events and has some discussion group activities. It does not have a resident rabbi. Some worship services are conducted at Hillel House, but they are not the same strict orthodox worship services that are held by plaintiff.

Several months before plaintiff's application for a special use permit was filed, Evanston approved a special use permit for the Hillel Foundation to operate a synagogue and rabbinical counseling facility at 2001 Orrington Avenue, which is across the street to the southeast of the subject property. However, the Hillel Foundation decided not to acquire the building, and the zoning board of appeals subsequently allowed the structure to be converted into two attached single-family dwellings. The Hillel Foundation's activities are unlike plaintiff's activities in

that plaintiff observes, teaches and encourages strict orthodox observance of Hasidic rites, practices and customs, while the Hillel Foundation is association with the worship, practices, customs and social aspects of Judaism generally.

Except for evidence relating to plaintiff's strict orthodox religious rites, practices and customs, the evidence at trial was typical of evidence that is found in zoning cases. This evidence included contradictory testimony as to the highest and best use of the property, the uses of property in the surrounding areas, the trend of development in the area, and the loss to plaintiff if the special use permit were denied as compared to the purported injury to the nearby properties if the permit were granted. This contradictory evidence is insufficient to demonstrate that the trial court's finding that plaintiff's application for a special use permit complied with Evanston's zoning ordinance was improper. Where, as in this case, the testimony is contradictory, the weight to be accorded the testimony is a matter to be determined by the trier of fact, and the findings of the trier of fact are not to be disturbed unless they are against the manifest weight of the evidence. See *City of Peru v. Nienaber* (1981), 97 Ill. App. 3d 925, 927, 424 N.E.2d 85, 87; *Stanek v. County of Lake* (1978), 60 Ill. App. 3d 357, 361, 376 N.E.2d 743, 747; *First National Bank v. County of Cook* (1977), 46 Ill. App. 3d 677, 683, 860 N.E.2d 1377, 1382.

•1 Under the circumstances, we conclude that the trial court's finding that plaintiff met "all of the requirements for the issuance of a special use permit as set forth in the Zoning Ordinance of the City of Evanston" is not against the manifest weight of the evidence, and that the finding was proper and should not be disturbed.

•2 We next address defendants' contention that the judgment should be reversed because it is based on the trial court's improper finding that the denial of plaintiff's application for a special use permit constituted an impediment to the free exercise of religion. In support of this contention, defendants

state that the "City's sole interest [in denying plaintiff's application] was to preserve the integrity of the Zoning Ordinance and the fine single-family character of the area in question." Defendants also state that "[t]his case is a simple zoning case in which the plaintiff happens to be a religious organization." In effect, defendants argue that we should disregard the fact that the right which defendants seek to restrict is the free exercise of religion. However, we believe that we cannot overlook this fact because the standard of judicial review for this case is determined by the nature of the right assertedly threatened or violated rather than the power being exercised or the specific limitation being imposed. (*Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68, 68 L. Ed. 2d 671, 680, 101 S. Ct. 2176, 2182.) In this regard, it is plain that the impact of Evanston's refusal to grant plaintiff's petition for a special use permit prevents plaintiff from the free practice of religion at this particular location, and so serves in some degree to limit the free exercise of religion. (See *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals* (1962), 25 Ill. 2d 65, 71, 182 N.E.2d 722, 725.) Thus, defendants' argument that we should ignore the fact that the right which defendants seek to restrict is the free exercise of religion is without merit.

•3 Of course, the location of churches and other religious sanctuaries can be regulated by zoning ordinances in proper cases. (See *South Side Move of God Church v. Zoning Board of Appeals* (1977), 47 Ill. App. 3d 723, 365 N.E.2d 118; *Coston Chapel A.M.E. Church v. Chaddick* (1972), 9 Ill. App. 3d 321, 292 N.E.2d 215; *St. James Temple of the A. O. H. Church of God, Inc. v. Board of Appeals* (1968), 100 Ill. App. 2d 302, 241 N.E.2d 525.) However, in determining whether this is a proper case for such a restriction, we must take into account that the right of freedom of religion, and other first amendment freedoms, rise above mere property rights. In addition, first amendment rights and freedoms far outweigh considerations of public inconvenience, annoyance or unrest. *Columbus Park*

Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals (1962), 25 Ill. 2d 65, 71, 182 N.E.2d 722, 725, citing *Terminiello v. Chicago* (1949), 337 U.S. 1, 4, 93 L. Ed. 1131, 1134, 69 S. Ct. 894, 896.

•4 Here, the trial court specifically found that plaintiff's proposed use meets all of the requirements for the issuance of a special use permit as set forth in Evanston's zoning ordinance. Thus, based on this finding, there was no proper reason to deny plaintiff's application for a special use permit. Yet, plaintiff's application was denied. Under the circumstances, we cannot overlook the fact that there are other religious facilities in the immediate area offering services similar to those proposed by plaintiff. The only apparent difference between plaintiff's proposed use and the uses made by the other religious associations is that plaintiff would use its facility to practice and teach strict orthodox observances of Hasidic practices and customs, and the other religious associations are using their facilities to practice and teach what the community may view as more palatable practices and customs. As the trial court stated in its memorandum opinion:

> "The evidence clearly infers that the defendant City is not concerned with lot lines, requirements, side yard, front yard and rear yard sizes, off street parking, number of occupants and other land use restrictions applicable to real property regardless of ownership. Rather the evidence infers that the real fear of the defendant City and intervenors is that the plaintiff will use its property to permit the plaintiffs to practice their ancient religion in the way they have conducted it for the past centuries, *i.e.* serving of kosher meals on high holidays to students at Northwestern, leaving those students stay overnight where their religious beliefs demand such and other practices."

This discredits defendants' statements that the "City's sole interest [in denying plaintiff's application] was to preserve the integrity of the zoning ordinance" and that "[t]his case is a simple zoning case in which the plaintiff happens to be a religious organization." Moreoever, after seeing and hearing all the witnesses and the evidence, the trial court specifically found that Evanston's denial of plaintiff's application "constitutes an impediment to the practice of Orthodox Jewish faith as practiced by members of Plaintiff and its followers ***," in violation of their rights under the first amendment to the Constitution of the United States. For these reasons, we believe that there is no merit to defendants' contention that the denial of a special use permit at this location was not an infringement of plaintiff's right to freedom of religion.

Accordingly, we conclude that the findings of the trial court were proper, and we affirm the judgment in favor of plaintiff.

Affirmed.

McNAMARA and McGILLICUDDY, JJ., concur.

APPENDIX C—TRIAL COURT'S FINAL JUDGMENT ORDER

STATE OF ILLINOIS }
COUNTY OF COOK } SS.:

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

THE LUBAVITCH-CHABAD HOUSE OF ILLINOIS, INC., an Illinois general not for profit corporation and LA SALLE NATIONAL BANK, as Trustee under Trust Agreement dated November 10, 1977 and known as Trust No. 53425,
Plaintiffs,

v.

THE CITY OF EVANSTON, a Cook County, Illinois Municipal Corporation,
Defendant,

and

MARY CLARE HENDERSHOT, ROGER FRISKEY, TIMOTHY WHITTEN, CLEO WHITTEN, JAMES DeBLOIS, SARAH DeBLOIS, MARC SIEGEL, MARY MacKENZIE, MARGARET BAAS, JEANETTE EVTY, ELLIOT SMITH, HAZEL SMITH, ROBERT S. ATKINS, and PATRICIA ATKINS,
Defendant-Intervenors.

No. 79 L 1904

JUDGMENT ORDER

THIS CAUSE having come on for trial on the Plaintiffs' Amended Complaint for Declaratory Judgment, the Answer of the Defendant, THE CITY OF EVANSTON, a Cook County, Illinois Municipal Corporation, and the Petition to Intervenors; and the Court having heard testimony and having considered the documentary evidence introduced by the several parties, the pleadings and briefs submitted by the respective parties and being fully advised in the premises, the Court finds as follows:

1. That it has jurisdiction of the parties hereto and the subject matter hereof.

2. That the Plaintiff, LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., is a general not for profit corporation duly authorized under the laws of the State of Illinois, on December 7, 1976, for the purpose of conducting religious services in accordance with the traditions and practices of Orthodox Judaism; to voluntarily assist persons pf the Jewish faith to practice Judaism as a way of life and to teach its applicability to everyday living, particularly among youth, students, and those engaged in academic life; and to conduct classes, lectures and issue literature to carry out such purpose.

3. That LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., an Illinois general not for profit corporation, is the holder of the beneficial interest in and to, and sole beneficiary of, the Plaintiff land trust LA SALLE NATIONAL BANK as Trustee under Trust Agreement dated November 10, 1977, and known as Trust No. 53425.

4. That Plaintiff, LA SALLE NATIONAL BANK as Trustee under Trust Agreement dated November 10, 1977, and known as Trust No. 53425, holds legal and equitable title in and to the real estate commonly known as 2014 Orrington Avenue, located within the City of Evanston, Illinois ("the subject property") legally described as follows:

The South Half of Lot 5 in Block 4 in Evanston in the Northwest ¼ of Section 18, Township 41 North, Range 14, East of the Third Principal Meridian in Cook County, Illinois.

5. That the subject property is improved with a two-story brick structure designed to accommodate two families on a site having a frontage on Orrington Avenue of 40 feet, and a depth of approximately 220 feet; and that adjacent to the subject property are the following: to the north is a similar two-story structure, occupied as a single-family residence; to the south is an Episcopalian counseling facility; to the west is a multi-family condominium building comprised of 40 apartment units; to the east, across Orrington Avenue, are single-family residences.

6. That the Defendant, THE CITY OF EVANSTON, is an Illinois municipality duly organized and existing under and by virtue of the laws of the State of Illinois located in the County of Cook.

7. That there is presently, and was in 1977 and for a long time prior thereto, in full force and effect in the City of Evanston, Cook County, Illinois, an ordinance known as The Zoning Ordinance of the City of Evanston, passed and approved January 18, 1921, as amended, which ordinance was passed by the City Council of said city and approved by its mayor pursuant to authority granted by the statutes of the State of Illinois; and that said ordinance has been amended from time to time subsequent to its adoption.

8. That pursuant to said Zoning Ordinance the subject property is, and at the time of its acquisition by Plaintiff was, zoned R-1 single-family residence district; and that said ordinance provides that a "church" is a designated special use in said R-1 zoning district.

9. That the criteria for the granting of a special use permit as set forth in the said Zoning Ordinance are as follows:

The Board of Appeals shall not recommend a special use unless it is necessary for the public interest or convenience at that location or, if private in character:

(a) It is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and

(b) It will not cause appreciable injury to the value of other property in the neighborhood in which it is located; and

(c) It will not subvert or defeat the primary purpose of the Zoning Ordinance, or of the zoning district or area for which it is proposed, when its effect is considered in conjunction with the cumulative effect of the number of various special uses of all types already located in the adjacent area and in the City as a whole; and

(d) It shall conform to the applicable regulations of the district in which it is located (unless modified by a planned development or a variation.)

10. That after proper application and after public hearing duly held, on September 19, 1978, the Zoning Board of Appeals of The City of Evanston, recommended to the Evanston City Council that Plaintiffs' application for a special use permit for the operation of a "church" be granted with conditions per Plaintiffs' Exhibit No. 18 in evidence attached hereto and by reference made an integral part of this Judgment Order; and that on October 17, 1978, said recommendation was forwarded to the City Council of The City of Evanston, which on December 11, 1978, pursuant to the recommendation of the Planning and Development Committee of the City Counsel, voted to overrule the recommendation of the Zoning Board of Appeals of the City of Evanston, such that Plaintiffs' application for a special use permit for the operation of a "church" was denied.

11. The Plaintiffs have exhausted their administrative remedies provided by law.

12. That the proposed use of the subject property by Plaintiffs does not constitute a "boarding house" as defined by the Zoning Ordinance of the City of Evanston, and said proposed use is so designed, located, and proposed to be operated, that the public health, safety and welfare will be protected; and that it will not cause appreciable injury to the value of other property in the neighborhood in which it is located; and that it will not subvert or defeat the primary purpose of the Evanston Zoning Ordinance, or the zoning district or area for which it is proposed, when its effect is considered in conjunction with the cumulative effect of the number of various special uses of all types already located in the adjacent area and in the City of Evanston as a whole; and that it conforms to the applicable regulations of the R-1 district in which it is located, thereby meeting all of the requirements for the issuance of a special use permit as set forth in the Zoning Ordinance of the City of Evanston.

13. That the City of Evanston has approved and permits the operation of other church uses in the immediate vicinity including: Canterbury House, an Episcopalian counseling facility immediately adjacent to the south; Lutheran House, a Lutheran church facility over a block to the north; and has approved a special use permit for B'nai B'rith Foundation of Northwestern University Inc. (Hillel House) at 2001 Orrington Avenue, Evanston, Illinois, to operate a synagogue and rabbinical counseling facility, across the street to the southeast of the subject property, which approval was given some months prior to Plaintiffs' application, but which use was abandoned.

14. That the proposed use of the subject property will provide an appropriate religious facility to the students attending, and faculty employed at, neighboring Northwestern University in particular; and that the aforesaid action taken by the

officers, agents, employees and appointed and elected officials of the City of Evanston, in denying said application for a special use permit for the operation of a church, constitutes an impediment to the practice of Orthodox Jewish faith as practiced by members of Plaintiff and its followers, in violation of their rights as defined by the 1st and 14th Amendments to the Constitution of the United States and by Article I Section 3 of the 1970 Constitution of the State of Illinois, and that Plaintiff, its members, and followers are being restricted from operating a sanctuary for Jewish religious services and rabbinical counseling on the subject property, such that Plaintiff, and its members and followers, are being denied the freedom to exercise their religion as guaranteed by the law.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That Plaintiffs, and its successors, if any, with the same or similar activities, have the right to use the premises commonly known as 2014 Orrington Avenue, Evanston, Cook County, Illinois as a church for the purpose of rabbinical counseling, discussion groups, religious worship services, and for all other purposes attendant to said use as a church; and that said uses shall include but shall not be limited to the serving of meals in conjunction with Sabbath and holiday religious services and the providing of over-night accommodations for observants of the Sabbath and holidays who do not live within walking distance of the subject property and who are prohibited by the observance of Orthodox tradition from traveling on the Sabbath and other Jewish holidays by other than pedestrian means.

2. That attendance at religious services and discussion groups shall be limited to a maximum of 30 persons or such lesser number as may be required by fire, safety or building code restrictions.

3. That a portion of the premises may be occupied as a single-family residence for an individual caretaker or a caretaker family, which may or may not be either a rabbi and/or lay personnel.

4. That the subject premises shall comply with all building code requirements of the City of Evanston.

5. That the special use shall apply only to Lubavitch Chabad House of Illinois, Inc. and its successors, if any, with the same or similar activities.

6. That the City of Evanston, its officers, agents, servants and employees are hereby restrained and enjoined from interfering with the Plaintiffs, or anyone claiming by through or under them, from in any way using the subject premises for the use of a church as provided in this order, pursuant to the zoning classification of the R-1 single family residence district under the Zoning Ordinance of the City of Evanston; and that upon application by Plaintiffs for an occupancy permit for the use of the subject premises as a church in accordance with this order, the officials of the City of Evanston, who are in charge of examining and issuing said occupancy permits, be and are hereby mandated to approve such application as to zoning without regard to the provisions of the Zoning Ordinance of the City of Evanston as same applies to the subject property, so long as said application conforms to the requirements of the R-1 single-family zoning district with a special use permit for a church under said ordinance, so that Plaintiffs, or anyone claiming by through or under them, shall have the right to operate a church upon their property for the uses and purposes heretofore set forth in this order.

7. That judgment is hereby granted in favor of Plaintiffs and against the Defendant, The City of Evanston, and against Defendants-Intervenors, on Counts I and II of Plaintiffs' Amended Complaint, and for costs.

8. That the court shall retain jurisdiction of this cause to issue such further orders until the terms of this order have been fully complied with in all respects.

9. That there is no just cause for delaying enforcement or appeal of this final judgment.

10. That the Opinion of the Court is appended hereto and made a part hereof.

March 3, 1981.

ENTERED:

/s/ JUDGE JAMES C. MURRAY
Circuit Court

George J. Anos and Lawrence M. Freedman
ASH, ANOS, FREEDMAN & LOGAN
Attorneys for Plaintiffs
77 West Washington Street
Chicago, Illinois 60602
346-1390

APPENDIX D—TRIAL COURT OPINION

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT—LAW DIVISION

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,
Plaintiffs

vs.

THE CITY OF EVANSTON, et al.,
Defendants

79 L 1904

OPINION OF COURT

This case arises out of an amended complaint for declaratory judgment filed by the Lubavitch Chabad House of Illinois against the City of Evanston. It seeks a declaratory judgment holding that the plaintiffs are entitled to use the premises at 2014 Orrington Avenue for a variety of purposes including rabbinical counseling, religious worship services on the Sabbath and on Jewish high holidays, sleeping facilities for religious purposes during the Sabbath period, library, kitchen facilities, office for the rabbi and other related facilities.

The first count of the complaint alleges that the plaintiffs are entitled to utilize the property for such use and that the refusal of the City Council to permit the use deprives them of their highest and best use of their property. The second count alleges that the refusal to permit the use denies the plaintiffs and its members freedom to exercise their religion as guaranteed by law. The City's answer to the amended complaint denies that the prohibition against the use violates the constitutional rights of the plaintiffs or that such prohibition denies

to the plaintiffs and their members freedom to exercise its religion as alleged.

As affirmative defenses the City alleged that the plaintiffs acquired the property with full knowledge that the proposed use was not permitted under the zoning ordinances of the City of Evanston and that any hardship is therefore self-created. The City avers that the proposed use of the subject property is not a church but a combination of uses including boarding house, administrative offices, youth center, counseling services, food preparation and service, and diverse other uses not permitted under the zoning ordinance of the City of Evanston.

It is further averred that the subject property has been used in an economical manner for residential purposes and is suitable for such use. That the entire block in which the subject premises is located is zoned and utilized for single-family purposes.

In response to the complaint that the City Council's action denied the plaintiffs' freedom of religion, the defendant admits that all religious organizations are subject to the reasonable regulations of the zoning ordinance and that the plaintiff failed to set forth wherein the denial of the special use permit was in any manner an arbitrary abuse of power; that the subject premises were designed as a residential structure and is not suitable for occupancy for the purposes to which the plaintiff intends to put the property.

The evidence discloses that Lubavitch Chabad is part of what is commonly known as Orthodox Judaism, a portion of a religious faith practiced by great numbers of the world's society, particularly those belonging to the Jewish Community.

The plaintiff, itself, is an Illinois not for profit corporation and by its charter limited to

(A) the conduct of religious services in accordance with the traditions and practices of orthodox Judaism

(B) to voluntarily assist persons of the Jewish faith to practice Torah Judaism as a way of life and teach its applicability to everyday living, particularly among the youth, among students, and those engaged in academic life, and other purposes necessary to carry out those stated.

The powers of the corporation limits the corporation to strictly religious purposes.

In 1977 the plaintiff acquired title to residential property known as 2014 Orrington in Evanston, Illinois, in close proximity to Northwestern University, a world renown educational center.

The real estate is improved with a two (2) story brick structure, designed to accomodate two (2) families on a site having frontage on Orrington Avenue of forty (40) feet and a depth of approximately two hundred twenty (220) feet. Adjacent to the subject property are the following uses: to the north a similar two (2) story structure occupied as a single family residence; to the south, an Episcopalian counseling facility contained in two (2) separate structures; to the west a multi-family condominium building comprising forty (40) apartment units; to the north, across Orrington Avenue, single family residences.

Pursuant to the applicable ordinance of the Defendant, CITY OF EVANSTON, the subject premises is, and at the time of its acquisition by plaintiff, zoned R-1 Single Family Residence District. The Evanston Zoning Ordinance provides that a "Church" is a designated special use in the R-1 Zoning District.

The criteria for the granting of a special use permit is set forth in the Evanston Zoning Ordinance as follows:

> The Board of Appeals shall not recommend a Special Use unless it is deemed necessary for the public interest or convenience at that location or, if private in character:

(a) It is so designed, located and proposed to be operated that the public health, safety and welfare will be protected; and

(b) It will not cause appreciable injury to the value of other property in the neighborhood in which it is located; and

(c) It will not subvert or defeat the primary purpose of the Zoning Ordinance, or of the zoning district or area for which it is proposed, when its effect is considered in conjunction with the cumulative effect of the number of various special uses of all types already located in the adjacent area and in the City as a whole; and

(d) It shall conform to the applicable regulations of the district in which it is located (unless modified by a planned development or a variation.)

On or about November 28, 1977, Plaintiffs were informed by the Department of Inspection and Permits of the City of Evanston that their purposed use of the subject property for religious services and rabbinical counseling, constituted a "church" as defined by the Zoning Ordinance of the City of Evanston and as such would require a special use permit. Plaintiffs filed a Request for Zoning Analysis, which they were informed was required prior to consideration by said Department of any application for a special use permit. After discussions and conferences with the various departments of the City of Evanston, during the period from November 28, 1977 to May 30, 1978, Plaintiffs filed a revised special use application with the City of Evanston.

As a result of the application on August 15, 1978, a public hearing was held before the Zoning Board of Appeals of the City of Evanston at which time testimony was taken and evidence was introduced with respect to Plaintiffs' application. Plaintiffs asserted before the Zoning Board of Appeals of the City of Evanston at said public hearing that they proposed to operate a Chabad House on the subject premises to serve the students at Northwestern University in their religious needs.

Plaintiffs asserted that the Chabad House would serve the students of Northwestern University in the following ways: provide religious counselling; conduct discussion groups; and hold religious prayer services on the Sabbath. Plaintiffs asserted that based upon their understanding of limitations imposed by the Evanston Building Code, there would never be more than thirty (30) persons taking part in such worship services.

There was further testimony that there would not be a daily kitchen in operation on the premises but that meals would be served to students participating in the Sabbath services. There was further testimony that overnight accommodations would be made on the Sabbath for a small number of students who might wish to participate in the Sabbath service, but who would not live within walking distance of the subject property and who would be prohibited by the observance of orthodox tradition from traveling on the Sabbath by other than pedestrian means.

b. Boarding House Variation

Plaintiffs also sought a determination by the Zoning Board of Appeals that contrary to the finding of the Zoning Administrator, their proposed use did not constitute a "boarding house" as defined by the Zoning Ordinances of the City of Evanston or in the alternative a variation from the boarding house requirements.

The Zoning Board of Appeals found that the weight of the evidence established that inasmuch as Plaintiffs requested no direct or indirect compensation for use of sleeping rooms, and inasmuch as there were no more nor less than guest rooms which were to be used in conjunction with religious practices, that the proposed use of the subject property did not constitute a "boarding house" as defined by the Zoning Ordinance of the

City of Evanston, such that no variation request with respect thereto was required. The Ordinance of the City of Evanston defines a "boarding house" as:

> "A building, or portion thereof, where meals are provided to five (5) or more persons, who are not members of the operator's family and by prearrangement for definite periods of time and for compensation, whether directly or indirectly."

c. Action on Special Use

On September 19, 1978, the Zoning Board of Appeals of the City of Evanston voted by a vote of *4 in favor* and *1 against* to grant Plaintiffs' application for a special use permit for the operation of a "church". On October 17, 1978 said recommendation, subject to certain conditions, was forwarded to the City Council of the City of Evanston, which on December 11, 1978, pursuant to the recommendation of the Planning and Development Committee of the City Council, voted to overrule the recommendation of the Zoning Board of Appeals of the City of Evanston and deny Plaintiffs' application for special use permit for the operation of a "church" by a vote of 12 for and 6 against. A motion to reconsider said denial on December 18, 1978 was defeated by a vote of 10 in favor and 9 against with the vote of the mayor being required to break the tie vote of the aldermen.

This action was commenced subsequent to this denial.

The matter was tried in a bench trial. The Court heard considerable testimony and received many exhibits, both from plaintiffs, defendant City, and Intervenors, who are single family residential owners of property in close proximity to the plaintiff's property.

The testimony and evidence consisted to a great extent to that presented in a conventional zoning case, that is: the uses of

property in the surrounding areas, the trend of development of property in the area, the impact of the university uses and other uses on the subject property, the highest and best uses of the property from both a real estate and zoning standpoint, the loss to the plaintiff as compared to the injury to nearby and adjacent properties and other evidence usually presented in a typical land use case. This testimony was, as in the usual zoning cases, contradictory. Despite able counsel for all parties and particularly that of counsel for defendant City to avoid any religious issues, evidence as to the plaintiff's religious activities was interjected into the trial.

For example, the religious singing and dancing that might be occasioned on the premises was inquired into, the practice of passing out candy during certain religious feasts was brought out in the evidence, the service of kosher meals in connection with religious services was referred to, permitting those attending high holiday services to remain overnight as a necessary religious requirement was brought out.

If this case were to be judged by the law of land use as historically applied to manufacturing, commercial, business or residential uses, the action of defendant City in this case would enjoy a presumption of validity that could be overcome only by clear and convincing evidence that the proposed use meets the criteria of LaSalle National Bank case and the many other cases setting forth the standards a property user must show to overcome the presumption of validity of a legislative land use restriction.

LaSalle National Bank and the other cases apply to the rights of property.

This case does not apply to plaintiff's property rights; it applies to the personal rights of the plaintiff, i.e. religious freedom.

Modern case law conclusively establishes that personal rights are more sacrosanct under our U.S. and state constitutions that property rights.

What might be upheld as a valid encroachment on a property right could be struck down as unconstitutional when applied to the exercise of a groups Right of Religious or other freedoms.

Even the defendants' own cited cases demonstrate this principle as the Supreme Court stated in Columbus Park Congregation v. Board of Appeals (1962) 25 Ill.2d 65, at p.71:

> "The foregoing principles apply to the imposition of zoning—restrictions on the property rights of any owner. However, in the case at bar the impact of the ordinance prevents plaintiff from the practice of their religion at this particular location and so serves in some degree to limit the free exercise of religion. While we do not doubt that the location of churches can be regulated in a proper case, the right of freedom of religion and other first amendment freedoms rise above mere property rights. They rise far above public convenience, annoyance or unrest."

The Supreme Court in the Columbus Park case struck down the action of the city not on constitutional grounds, but on the fact that the evidence before its zoning Board of Appeals indicated the denial of a special use was arbitrary and capricious. The Supreme Court did not remand the case to the City's Zoning Board; they remanded the case to the trial court with directions to order the issuance of special use permit.

The able counsel for the city of Evanston argues that the Columbus Park case does not apply because it recognizes the right of a municipality to subject religious property to properly applied zoning regulations and argues that the evidence disclosed that the plaintiff's proposed use does not conform to the special use factors established by its zoning code in order to use residential property for religious purposes and in fact indicates that the proposed use is contrary to those factors.

The evidence clearly infers that the defendant City is not concerned with lot lines, requirements, side yard, front yard and rear yard sizes-, off street parking, number of occupants and

other land use restrictions applicable to real property regardless of ownership. Rather the evidence infers that the real fear of the defendant City and intervenors is that the plaintiff will use its property to permit the plaintiffs to practice their ancient religion in the way they have conducted it for the past centuries, i.e. serving of kosher meals on high holidays to students at Northwestern, leaving those students stay overnight where their religious beliefs demand such and other practices. In their answer defendant denies the proposed use is as a church but a combination of non religious uses.

The attorney for the City cites in his brief a number of cases standing for the proposition that a religious institution is subject to a properly applied zoning restriction.

He cites among other cases the following Illinois cases; St. James v Board of Appeals, 100 App.2d.302; Coston Chapel A.M.E. v. Chaddick, 9 App.3d.321, and South Side House of God v Zoning Board of Appeals, 47 App.3d.73.

In all three cases the Appellate Court affirmed decisions on administrative review denying a religious use of property because the plaintiff's evidence failed to meet the City's (in those cases) standards for a special use.

Defendant's attorney argues that those cases and other cases from other jurisdictions compel this court to deny plaintiffs the relief they here seek.

An examination of those cases disclose that the court should if to be consistent to the conclusion reached by the Appellate Courts in those cases reach an opposite result.

In all of those cases the respective Zoning Board of Appeals in those cases found the evidence failed to establish that the religious use contemplated met the zoning ordinances' requirement. So, the courts affirmed the position of those Zoning Boards.

Here, the defendant, Zoning Board of Appeals, found that the plaintiff's evidence *did meet* the requirements of defendant's Zoning ordinance.

The main difference between the present case and defendant's cited cases is that in the cases cited by defendant the involved Zoning Boards were a body clothed with final power to grant or deny a special use permit.

In the present case the City's Zoning Board of Appeals is a recommending body not a city agency with final authority.

To suggest that the fact findings of a public body that has only recommending powers should be given less weight in a court of justice than the ultimate action of a legislative body that makes no findings of fact may be proper in an appropriate case. This court does not feel it is so in a case involving rights protected by the first amendment of our United States Constitution.

Further, in none of the cases cited by defendant was there in existence adjacent or in close proximity of the proposed religious use (1) a religious student counseling service, (2) a religious use in the next block, (3) a similar special use granted but never perfected across the street, and (4) a major nationally renown university near the subject property.

More, akin to the case at bar is a case not cited. That is the case of *Twin City Bible Church* v. *Zoning Board of Appeals*, 50 App. 34,924.

In that case the Zoning Board denied a special use in a residential area on the ground that the proposed use for a Sunday School and Bible Classes were not a church but an educational facility.

The Court rejected the decision of the Zoning Board noting that it is the use planned and not the nature of the using that controls the issue of whether a use is a religious use protected

by first amendment guarantees. The court there rejected the contention that the proposed use was not a church use.

The evidence in this case is overwhelming that the proposed use is a church use to serve the religious goals of plaintiff as they relate to a great non-sectarian university and not a boarding house, eatery or administrative office of some religious cartel as suggested by some of defendant's evidence. It is for a court to define what is a church not a legislative body.[1]

The evidence here does not disclose that plaintiff's intent to change one iota the physical characteristics of the two-family residence, presently located on the property. Rather the evidence and any decree based on the evidence discloses and will declare a permitted religious use consistent with all requirements of defendant's zoning ordinances that are otherwise consistent with the public health, safety and welfare legislative requirements of the City of Evanston.

Counsel for defendants argue that this court is in error in considering the special use of the Canterberry House, the Lutheran use a short distance away, the Hillel House use permitted and then abandoned across the street. He is right in the ordinary case. He is not right in a case involving a charged discrimination on account of race, creed or national origin, or any alledged unconstitutional infringement on First Amendment Rights.

In Arlington Heights v Metropolitan Housing Corp. (1976) 429 U.S. 252, in noting the difficulty in proving discrimination in a case involving the question of whether a legislative land use decision results in an unconstitutional invidious discrimination with respect to what a court may consider (p. 267):

> "The historical background is one evidentiary source x x x x The specific sequence of events leading up to the challenged decision also may shed some light on the decision maker's purpose."

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[1] See *Palella* v. *Loyden Family Service* (1980) 79 Ill.2d,493,p.499.

So as the court weighs all the voluminous evidence presented by all parties placing on one side of the scale of justice defendants' City and Intervenors' evidence indicating a consistency with the public health, safety and welfare in the refusal of the plaintiff's proposed use of the property at 2014 Orrington, including the presumption of validity every legislative act enjoys and placing on the other side of the scale the constitutional guarantee of the right of people to peacefully assemble to worship consistent only with dictates of their own conscience together with the evidence of the effect the plaintiff's proposed use will have on the value and peaceful use of the nearby property of Intervenors and other residents of Evanston, and the other effect of the proposed use on the public health, safety and welfare of the community of Evanston, the court finds the scale weighs more heavily in plaintiff's favor.

In this case in reaching this result the court wishes to emphasize that the record does not disclose any intentional discrimination on the part of defendant City, Intervenors or their counsel. Quite the contrary, the record shows all parties acted completely consistent with the highest standards of justice.

However, a court must act on evidence and law. This court feels that the evidence and law in this case discloses for the reasons stated the plaintiff is entitled to a declaratory judgment in its favor to the effect that the defendant City's action in denying the plaintiff a special use of its property is arbitrary and capricious, bearing no relationship to the public health, safety and welfare and declaring that plaintiffs have the right to the issuance of the special use permit that was recommended by defendants' Zoning Board of Appeals.

The attorneys for the parties are requested to prepare a draft order effecting this court's opinion on or before February 20, 1981 at 10:00 A.M.

Respectfully,

/s/ JAMES C. MURRAY
James C. Murray, Trial Judge

APPENDIX E—CONSTITUTIONAL PROVISIONS

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT [I.]

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Office-Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-325

In The

Supreme Court of the United States

October Term, 1983

CITY OF EVANSTON,

Petitioner,

MARY CLARE HENDERSHOT, et al.,

Petitioner-Intervenors,

vs.

LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENTS' BRIEF IN OPPOSITION

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No. 83-325

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LUBAVITCH CHABAD HOUSE OF ILLINOIS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This matter arises out of a Complaint for Declaratory Judgment filed by Respondents in the Circuit Court of Cook County, Illinois, seeking a declaration that they were entitled to the issuance of a special use permit for the operation of a "church" under the zoning ordinances of the Petitioner, City of Evanston. The Amended Complaint was framed in two counts, the first count of which

alleged that the City's denial of a special use permit was contrary to and inconsistent with the standards set forth in the City's zoning ordinance, and the second count of which alleged that the denial of the special use permit constituted an impediment to the practice of the Orthodox Jewish faith as practiced by members of the Respondents' organization and its followers in violation of their federal and Illinois constitutional rights.

The City filed an Answer denying Respondents' allegations, and further affirmatively alleged that: any hardship to Respondents was self created; the proposed use was not a church under the City's zoning ordinance; and that the City's action was a valid exercise of its police power.

After hearing testimony and evidence for over eight (8) months on an intermittent basis, on March 3, 1981, the Circuit Court of Cook County, Illinois entered a judgment order finding for Respondents on both counts of their Amended Complaint and holding that Respondents could operate a church (synagogue) for the purposes of: rabbinical counseling; discussion groups; religious worship services; and for other purposes attendant to a church. The trial court's order specifically found that Respondents' proposed use had met all of the standards for the issuance of a special use permit which were established by the ordinances of the Petitioner, City of Evanston. Said judgment order also imposed certain restrictions on Respondents as conditions to the issuance of the special use permit, to wit: attendance at religious services and discussion groups were to be limited to a maximum of thirty (30) persons, or such lesser number as may be required by

fire, safety or building code restrictions; a portion of the premises may be occupied as a single family residence for an individual caretaker or caretaker family; the premises must comply with all building code requirements of the City of Evanston; and the special use permit would only apply to the Respondent organization and any successors with the same or similar activities.

Petitioners appealed from the aforesaid judgment order to the Appellate Court of Illinois, First District, which affirmed, holding that the trial court's finding, that Respondents met all of the requirements for the issuance of a special use permit as set forth in the zoning ordinance of the City of Evanston, was not against the manifest weight of the evidence, and as such the judgment order was proper and should not be disturbed. The Appellate Court of Illinois also found that the location of churches and other religious sanctuaries can be regulated by zoning ordinances in proper cases, but that in view of the fact that the proposed use met all of the requirements for the issuance of a special use permit as set forth in the City's ordinance, the improper denial of Respondents' application for a special use permit also constituted an infringement of Respondents' constitutional right to freedom of religion.

Petitioners petitioned the Illinois Supreme Court for leave to appeal from the decision of the Appellate Court of Illinois, which petition was denied.

REASONS FOR DENYING THE WRIT

A. The decision of the Appellate Court of Illinois which the Illinois Supreme Court declined to review presents no constitutional issue.

Petitioner argues that "the writ should be granted in this case because the decision of the Illinois Appellate Court is clearly in conflict with this Court's implicit holding that a zoning ordinance which prevents the construction of a religious use does not violate the First Amendment." (Pet. for Writ of Cert. p. 7) Petitioner contends that the opinion of the Illinois Appellate Court is contrary to the proposition that religious institutions are subject to zoning ordinances. Petitioner submits that if the decision of the Appellate Court in the instant case were permitted to stand, it would place religious institutions beyond the reach of reasonable zoning ordinances. (Pet. for Writ of Cert. p. 8).

Even the most cursory reading of the Illinois Appellate Court opinion demonstrates that the Illinois court clearly recognized the right of the City of Evanston to reasonably regulate Respondents' proposed use under its zoning ordinances. As stated by the Illinois Appellate Court:

> "Of course, the location of churches and other religious sanctuaries can be regulated by zoning ordinances in proper cases. (See *South Side of God Church v. Zoning Board of Appeals* (1977), 47 Ill. App. 3d 723, 365 N. E. 2d 118; *Coston Chapel A.M.E. Church v. Chaddick* (1972), 9 Ill. App. 3d 321, 292 N. E. 2d 215; *St. James Temple of the A. O. H. Church of God, Inc. v. Board of Appeals* (1968), 100 Ill. App. 2d 302, 241 N. E. 2d 525.) However, in determining

> whether this is a proper case for such a restriction, we must take into account that the right of freedom of religion, and other first amendment freedoms, rise above mere property rights. In addition, first amendment rights and freedoms far outweigh considerations of public inconvenience, annoyance or unrest. *Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals* (1962), 25 Ill. 2d 65, 71, 182 N. E. 2d 722, 725, citing *Terminiello v. Chicago* (1949), 337 U. S. 1, 4, 93 L. Ed. 1131, 1134, 69 S. Ct. 894, 296."

Lubavitch Chabad House of Illinois, Inc. v. City of Evanston, 112 Ill. App. 3d 233, 445 N. E. 2d at pp. 346-347.

Furthermore, the Illinois Appellate Court, rather than finding, as suggested by Petitioners, that Respondents' proposed use as a religious institution was immune from municipal regulation, was in agreement with the Zoning Board of Appeals of the City of Evanston and the trial court that the Respondents had met all of the requirements for the issuance of a special use permit as set forth in Petitioners' very own ordinance. As stated by the Illinois Appellate Court at 445 N. E. 2d at p. 347:

> "Under the circumstances, we conclude that the trial court's finding that plaintiff met 'all of the requirements for the issuance of a special use permit as set forth in the Zoning Ordinance of the City of Evanston' is not against the manifest weight of the evidence, and that the finding was proper and should not be disturbed".

The Illinois Appellate Court did conclude that, inasmuch as Respondents satisfied all of the criteria for the issuance of the special use permit established by the City in its ordinances, the impact of Petitioners' unjustified refusal to grant Respondents' petition for a special use permit resulted in preventing Respondents from freely practicing their religion at the particular location in ques-

tion. In so holding, the Illinois Appellate Court rejected Petitioner's urging that the court should disregard the fact that the right which Petitioners sought to restrict was the right of free exercise of religion. This Court's decision in the case of *Schad v. Borough of Mount Ephraim* (1981), 452 U.S. 61, 68 L.Ed. 2d 671, 680, 101 S.Ct. 2176, 2182 clearly supports the conclusion of the Illinois Appellate Court in holding, that although the power of local governments to zone and control land use is undoubtedly broad, and its proper exercise is an essential aspect of achieving a satisfactory quality of life, the zoning power is not infinite and is subject to judicial review. As stated by this Court:

> "... as is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. Thomas v. Collins, 323 U.S. 516, 529-530, 89 L.Ed. 430, 65 S.Ct. 315 (1945)." *Schad supra* at page 680.

The Illinois Appellate Court's opinion is in further conformity with the decisions of this Court that the reasonableness and scope of municipal regulation are the important factors which must be considered when a zoning ordinance is sought to be applied to restrict First Amendments rights, and particularly the right of freedom of religion which occupies the highest among First Amendment values. *Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Thomas C. Collins,* 323 U.S. 516 (1945); *Village of Schaumburg v. Citizens For Better Environment,* 444 U.S. 620, 637, 63 L.Ed. 2d 73, 100 S.Ct. 826 (1980); See also *Pfeffer,* "The Supremacy For Free Exercise" 61 Georgetown, L. Rev. 1115 (1973).

B. This Court will not entertain appeals from state court decisions which rest on adequate and independent grounds.

The law is well-settled that this Court will not entertain appeals from state court decisions which rest on adequate and independent state grounds.

> "This Court from the time of its foundation has adhered to principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis,* 20 Wall. (U. S.) 590, 636, 22 L. Ed. 429, 444; *Berea College v. Kentucky,* 211 U. S. 45, 53, 53 L. Ed. 81, 85, 29 S. Ct. 33; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.,* 243 U. S. 157, 164, 61 L. Ed. 644, 648, 37 S. Ct. 318; *Fox Film Corp. v. Muller,* 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the State and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over State judgments is to correct them to the extent that they incorrectly adjudge federal rights."

Herb v. Pitcairn, 324 U. S. 117, 125-126 (1944).

As a general rule, this Court will accept as controlling the decisions of the state courts upon questions of local law, both statutory and common. *American Railway, Exp. Co. v. Kentucky,* 273 U. S. 269, 272 (1926).

Even assuming *arguendo* that the decision of the Illinois Appellate Court, which the Illinois Supreme Court declined to review, constituted an erroneous interpretation of the First Amendment issues raised in the second count of Respondents' Amended Complaint, review by this Court would still not be justified. Before this Court will review the decision of a state court, it must affirmatively

appear from the record that whatever federal question is involved was necessary to the determination of the case by the state court. Where a decision of a state court might have been either on a state or federal ground, and the state ground is sufficient to sustain the judgment, this Court will not undertake to review it. *Durley v. Mayo,* 351 U. S. 277, 281 (1955).

Consequently, the finding of the Illinois Appellate Court, affirming the trial court's finding that Respondents met all of the requirements for the issuance of a special use permit as set forth in the zoning ordinance of the City of Evanston, clearly constitutes an independent basis under Illinois law, absent any federal constitutional issue, supporting the position of Respondents in a land use zoning case involving the interpretation of the statutory requirements of the City's local zoning ordinance. The City's own Zoning Board of Appeals, the trial court, and the Illinois Appellate and Supreme Courts held that the City's zoning ordinances were indeed applicable to Respondents, and that Respondents' proposed use fully complied with the standards of said ordinances.

CONCLUSION

The Zoning Board of Appeals of the Petitioner, City of Evanston, the Circuit Court of Cook County, Illinois, the Illinois Appellate Court, and the Supreme Court of Illinois have found that Respondents have met all of the standards set forth in Petitioners' zoning ordinance for the issuance of a special use permit to operate a "church", subject to certain use restrictions imposed by the trial

court in its judgment order. Such a finding presents no constitutional issue for this Court's review. The Petition for Writ of Certiorari should be accordingly denied.

Respectfully submitted,

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